89-628

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

MOUNTAIN STATES LEGAL FOUNDATION, *et al.*,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ISSUE PRESENTED

In a case where a plaintiff has challenged a general purpose government program which serves many purposes, some of which may injure the plaintiff, some of which may help the plaintiff, and a majority of which have no impact on the plaintiff:

Whether standing lies for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations.

LIST OF PARTIES

Mountain States Legal Foundation (MSLF or Foundation) and the Minerals Exploration Coalition were Defendant-Intervenors-Appellees in the United States Court of Appeals for the District of Columbia Circuit.

The following were Defendants-Appellees in the United States Court of Appeals for the District of Columbia Circuit: Robert F. Burford, in his official capacity as Director of the United States Bureau of Land Management (Mr. Burford has been replaced in that capacity by Cy Jamison); Donald P. Hodel, in his official capacity as Secretary of the Interior (Mr. Hodel has been replaced in that capacity by Manuel Lujan, Jr.); and the United States Department of the Interior.

ASARCO, Inc., was granted intervention in the District Court proceedings by the District of Columbia Court of Appeals. ASARCO, which was an Applicant for Intervention at the time, did not file a Notice of Appeal in the case at bar.

The National Wildlife Federation was Plaintiff-Appellant in the United States Court of Appeals for the District of Columbia Circuit.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

Review is sought of the opinion reported as *National Wildlife Federation v. Burford*, 878 F.2d 422 (D.C. Cir. 1989), appearing at pages App. 15-App. 42 of the Appendix. The District Court's opinion, *National Wildlife Federation v. Burford*, No. 85-2238 (filed Nov. 4, 1988), and order appear at pages App. 1-App. 14 of the Appendix.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit rendered judgement against the Petitioners on June 20, 1989. The mandate was ordered to issue on or about August 4, 1989.[1] On September 11, 1989, Chief Justice Rehnquist entered an order granting the Petitioners an extension of time in which to file this petition to and including October 18, 1989.

This Court's jurisdiction arises pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

This action is based on Article III standing requirements of the United States Constitution.

STATEMENT OF THE CASE

The Withdrawal Review Program

The Respondent in this case has undertaken a sweeping challenge of a broad, general purpose, statutorily mandated, government program: a program to eliminate unneeded withdrawals and classifications of the public lands. Years ago when the withdrawals and classifications in question were created, they served a multitude of

[1] The federal government's motion to stay mandate pending petition to this Honorable Court was denied by the Court of Appeals on August 1, 1989.

purposes. However, since the purposes originally sought to be served by the withdrawals and classifications had ceased to exist, those withdrawals and classifications of the public lands were eliminated by the Bureau of Land Management (BLM) under its Withdrawal Review Program. *See* 43 U.S.C. § 1714(*l*) (1982).

The public lands of the United States are generally available for a host of uses under numerous statutes. Both public and private entities can take advantage of opportunities to use the federal domain. For example, a private person can stake a mining claim,[2] request a land exchange to make management of one's ranch easier,[3] or establish a communication site.[4] A public entity can build a dam, establish a military reserve, or create a park or wildlife refuge. Hundreds or thousands of other possible uses exist.

If an anticipated future use of a portion of the public lands would be exclusive of other uses, then the federal land management agencies can "withdraw" that land from the public domain. For example, some of the withdrawals in this case involved proposed dam sites. If the government wishes to build a dam, then almost all other permanent uses in the flooded area are incompatible. The prudent federal land manager precludes those incompatible uses by making a withdrawal. Land classification works in a similar fashion. Many areas affected by this suit were classified for disposal or sale. Again, other

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[2] *See*30 U.S.C. § 22 (1982).

[3] *See*43 C.F.R. Part 2200 (1988).

[4] *See*43 U.S.C. § 1732(b) (1982).

permanent uses in areas to be sold would be incompatible, so the prudent federal land manager uses classification to restrict conflicting uses. *See* App. 18-19.

The need for a withdrawal review program became evident as many of the original purposes for which land was withdrawn or classified failed to come to fruition. Many dams that were proposed were never built. Most of the area that was classified for sale was never sold, and Congress subsequently changed its policy to discourage sale of the public lands. By the 1950s, it became clear that there were thousands of withdrawals and classifications which served no purpose except to obstruct efficient land use and management.

Withdrawal review began as an internal program of the Bureau of Land Management in 1956. 2 C. WHEATLEY, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS 420 (1969). Apparently, little progress was made under that early program, so, in 1976, Congress mandated the Withdrawal Review Program at issue here and set a deadline for completion of that program in the Federal Land Policy and Management Act of 1976. 43 U.S.C. § 1714(*l*) (1982). As a result, in the late 1970s, the Carter administration set up procedures for the Withdrawal Review Program and began to make the revocations that are challenged in this case. The Reagan administration continued to revoke unneeded withdrawals.[5]

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[5] In its complaint, the Respondent chose to address only those withdrawal revocations and classification terminations initiated after January 1, 1981. This constituted 180,000,000 acres, or an area larger than the State of Texas.

The sufficiency of the administrative process accompanying the Withdrawal Review Program is the issue raised by Respondent's complaint. In reviewing the issue presented, this Honorable Court should be aware that each one of the more than 814 agency actions challenged in this case was preceded by its own administrative decision-making process. *See* App. 11 at n.12. Each revocation of a land withdrawal or termination of a land classification was announced in the *Federal Register.*

For example, the individual parcel of land near Lander, Wyoming, that is the situs of the injury alleged for Respondent's standing was opened to mining only after a thorough administrative process. The BLM sought extensive public participation and conducted complete environmental review and planning, including environmental review pursuant to the National Environmental Policy Act of 1969. App. 11 at n.12.[6] Environmental

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[6] After the District Court received evidence on the procedures that were conducted in the area where the Respondent claims injury for standing in this case, the Court made the following statement:

> The Kelly Affidavit sets forth in great detail the voluminous process started in 1977 and concluded in 1984 that the BLM office in Lander, Wyoming followed in reaching its decision to terminate Classification No. W-6228. It completely answers plaintiff's claims of inadequate land use plans, lack of conformance determinations and insufficient opportunities for public participation.

National Wildlife Federation v. Burford, NO. 85-2238, Memorandum Opinion at 10-11, n.12 (November 4, 1988), App. 11.

groups and others had ample opportunity to be heard – and they were heard – in the agencies' decision-making process before individual actions were undertaken, or proposed to be undertaken following the elimination of unnecessary withdrawals and classifications. *See Id.*

This Honorable Court should also note that the intent of the Withdrawal Review Program is not to terminate "environmentally protective" withdrawals and classifications. The only "protection" intended by the withdrawals and classifications is from conflicts in land use that no longer exist. Any environmental protection provided by the withdrawals and classifications is incidental at best. For example, a dam site or a bombing range withdrawal may prevent mining, but these withdrawals can hardly be classified as "environmentally protective." Probably the greatest bulk of the withdrawals and classifications was for such things as sale to the public or pathways for cattle drives.[7] Obviously, these withdrawals and classifications provided no "environmental protection."

Proceedings in This Case

On July 15, 1985, the Respondent brought suit against the government to enjoin the withdrawal Review Program. Petitioners intervened in the District Court to protect the interests of their members who are individuals, businesses, and other organizations who had acquired interests in areas of revoked withdrawals or terminated classifications. On December 4, 1985, the District Court issued a preliminary injunction precluding any activity that was originally

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[7] This last use accounts for a large number of revocations.

prohibited on any of the 180,000,000 acres of withdrawal revocations and classification terminations made after January 1, 1981. The Court enjoined approximately 814 past agency actions along with all similar future actions. The parcel of land near Lander, Wyoming, upon which the Respondent asserts its standing, was just one of the 814 areas on which activities were enjoined.

Approval of mining plans, which are of particular interest to the Petitioners, were enjoined. Also enjoined were such actions as removal of a dam site withdrawal in the Grand Canyon, consolidation of land in wilderness areas, acquisition of private inholdings in wildlife refuges, and a land exchange involving the Nature Conservancy. Numerous other environmentally beneficial actions were enjoined as well. The injury complained of by Respondent to gain standing – primarily the opening of land to mineral exploration under the General Mining Law of 1872 – involved only 13,000,0000[8] acres of the 180,000,000 acres enjoined by the suit, or about seven percent of the total acreage. *See* App. 19.

Once the sweeping injunction was in place, the Respondent assumed the role of *de facto* federal land manager. I[illegible] at least one instance, the Respondent sought to exclude a parcel of land from the suit. The proponent

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[8] 13,000,000 acres of the land area opened to entry for mining under the General Mining Law of 1872, 30 U.S.C. § 22 (1982). The actual area disturbed by mining is only a few hundred acres. It is unknown whether there are mining impacts on the 8,000,000 acres of mineral leases involved in this case or whether these acres overlap with the 13,000,000 acres opened to the Mining Law.

of a land exchange which had been blocked by the injunction contacted the Respondent; and, after investigation, the Respondent's staff determined that the revocation benefited rather than hurt its interest. It then filed a motion with the court to allow the revocation on that one parcel to proceed.[9]

The suit presented an untenable situation for the Petitioners' members who must be able to rely on the certainty of federal permits and federal title for activities upon or rights to public land. Petitioners' members, who hold mining claims and mineral leases, after completing every necessary environmental and public participation procedure at the local level, were now faced with the prospect of losing all of their rights because of an alleged flaw in a national program.

The Petitioners presented the foregoing facts and following arguments in defense of the Respondent's appeal to the District of Columbia Court of Appeals. The Court of Appeals dismissed the arguments as being without merit and declined to consider the legal arguments presented below. App. 28-29, n.10. The Court of Appeals held that the one alleged injury caused by a classification termination near Lander, Wyoming – which the Respondent failed to challenge during the lengthy environmental review process that preceded the classification termination – was sufficient to establish standing to challenge the entire program. App. 32. Thus the Court of Appeals held that the Respondent, having foregone its earlier opportunity for a focused challenge to a specific proposed

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[9] *National Wildlife Federation v. Burford*, No. 85-2238 (NWF Motion for Voluntary Dismissal, filed April 11, 1986).

federal action, was now free to attack the broad general purpose, statutorily mandated, government program under which the specific action was taken.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S LONG ESTABLISHED RULE THAT PROGRAMS ARE NOT JUSTICIABLE

A. Only Agency Actions, Not Programs, Are Justiciable

The decision of the District of Columbia Court of Appeals conflicts with a long established rule of this Honorable Court that programs are not justiciable. In *Ashwander v. TVA*, 297 U.S. 288 (1936), this Honorable Court addressed a challenge to an individual agency action and to the program under which the action was taken. While the challenge to the single agency action – a TVA contract – was allowed, the challenge to the program under which the contract was authorized was not. This Honorable Court found that the program being challenged "did not give rise to a justiciable controversy save as [it] had fruition in action of a definite and concrete character." *Id.* at 324.

This Honorable Court has more recently addressed the subject of challenges to agency programs in *Allen v. Wright*, 468 U.S. 737 (1984). In *Allen*, this Honorable Court used the "fairly traceable" element of standing in its reasoning. The Court discussed the issues as follows:

> The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury 'fairly can be traced to the challenged action' of the IRS. . . . That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal court adjudication.

Id. at 759-60. This statement from *Allen* presents the same issue as in the case at bar and answers that issue with the general rule that there is no standing for suits challenging programs.

In the present case, apparently the Respondent has completely foregone its opportunity to challenge the individual actions taken under the Withdrawal Review Program. In fact, the Respondent had ample opportunity to participate in the individual agency decision from which it now claims injury – that is the decision near Lander, Wyoming. *See* App. 11 at n.12. Each of the 814 agency actions caught in the web of this programmatic challenge was accompanied by an administrative process. If the Respondent had been diligent, then it could have challenged the individual agency actions thereby seeking and receiving any remedy it was due.

By allowing the Respondent to challenge a general purpose government program where only a small part of that program allegedly causes injury, the Court of Appeals allows Respondent a perverse economy of scale. In the process, the Court of Appeals does serious harm to

the government's ability to create rational and reliable programs. In the most extreme cases, like the case at bar, the process adopted by the Court of Appeals can allow a private organization to usurp federal land management authority. Moreover, and more importantly to the Petitioners, it seriously injures those who rely on a federal program and who must deal with the consequent irrationality or usurpation of authority.

B. This Case Does Not Fall into the Narrow Exception That Allows for Justiciablity of Programs That Are Like Single Agency Actions

A few court of appeals cases have addressed the issue of challenges to agency programs, and where the facts showed that the program had the characteristics of a single agency action, they have allowed standing. Unlike the Court of Appeals in the present case, each court considered the justiciablity rule of *Ashwander* or a derivation of that rule. Where standing was allowed, it was because the program in question had the character of a single government action.

In *Scientist Institute for Public Information, Inc. v. Atomic Energy Comm'n (SIPI)*, 481 F.2d 1079 (D.C. Cir. 1973), the District of Columbia Court of Appeals addressed a challenge to the Atomic Energy Commission's liquid metal cooled fast breeder reactor (LMFBR) program. The court considered and quoted *Ashwander*. It also considered that the LMFBR program would result in construction of a reactor demonstration facility. The court concluded that the LMFBR program was of sufficient

"definite and concrete character" to overcome the *Ashwander* preclusion on challenges to government programs.

Another case, *Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975), *rev'd on other grounds sub nom, Kleppe v. Sierra Club*, 427 U.S. 390 (1976), followed *SIPI*. That case addressed coal leasing covered by the Northern Great Plains Resources Program. In order to find the case justiciable, the court required the plaintiff to allege a reasonable basis for treating the coal leases cumulatively. In essence, the plaintiff was required to show the character of a single impact – similar to a single agency action.

The logic of a limited exception to the rule that programs of an agency are not justiciable is apparent. The government should not be allowed to accomplish its ends out of sight of judicial review by calling an agency action a "program." That has not happened in the present case. The Withdrawal Review Program serves a multitude of divergent, and some would argue, conflicting interests. Moreover, the distinction between the Withdrawal Review Program and the individual revocation actions taken under the program is clear. Each action had its own decision-making process, involved separate environmental issues and studies, and had its own *Federal Register* notice with opportunity for everyone, including the Respondent, to appeal or bring suit.

The case at bar bears none of the key characteristics of *SIPI* or *Sierra Club v. Morton*. The program will not result in a single facility as in *SIPI*, but will have thousands of very different and diverse results. It will not result in clear cumulative impacts as in *Sierra Club v.*

Morton, but will result in impacts that offset each other. It would be an exercise in futility for the government to add up the cumulative impact of such things as mining, creation of wildlife refuges, removal of dam sites and bombing ranges, removal of pathways for cattle drives, and innumerable other uses in locations from Florida to Alaska. There is no way to define one impact.

There is simply no rational way to view the Withdrawal Review Program as being like a single action. For that reason the exception of *SIPI* does not apply and the rule of *Ashwander* precludes standing or justiciablity. The decision of the Court of Appeals is in conflict with this Honorable Court's rule precluding justiciability of government programs.

II. THE COURT OF APPEALS' DECISION WILL HAVE A DEVASTATING IMPACT ON ANYONE WHO RELIES ON A GOVERNMENT PROGRAM

By allowing challenges to agency programs, the Court of Appeals opens the door to lawsuits capable of disrupting large portions of the government. Individuals or companies who must acquire government permits – such as the Petitioners' members – may lose their permits or property in public policy litigation. As this Honorable Court stated in *Allen v. Wright*, 468 U.S. 737, 760 (1984), such broad issues are the province of Congress, not the courts.

The case at bar presents a classic example of the importance of the issue to be reviewed. The effect of the decision of the Court of Appeals is to throw the titles to

7,000 mining claims and 1,000 mineral leases on the public lands into doubt. Numerous other property interests – perhaps thousands of interests – are impacted as well. Any use of the 180,000,000 acres of public land at issue is placed in doubt.

The Court of Appeals' decision has raised the specter that the withdrawal revocations and classification terminations may be void for procedural failures. One result of this could be that all title acquired subsequent to the revocation or termination may be void *ab initio*. The decision has put a cloud on title that is all but impossible for the best landman to find. It has threatened millions of dollars of investments made on the assumption that title in the land was secure.

The members of the Foundation and the Minerals Exploration Coalition established their mineral title by following the Mining Law of 1872, 30 U.S.C. § 22 (1982), and the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982). Prior to acquiring their interests, those represented by the Petitioners checked to see that the land where they established their interest was properly open to entry. Many of them had participated – along with environmental groups – in the extensive public process that led to the revocation of many of the withdrawals and classifications.

The record shows that extensive planning, public participation, and environmental procedure accompanied the decision to revoke withdrawals. *See* App. 11 at n.12. There was simply no way for the potential claimants or lessees to tell that there might be a title defect in the

Washington, D.C., records and structure of an agency program.

It is fundamentally unjust for the Respondent in this action to attack title by attacking the program when it could have objected to individual revocations in the local area at the time they were made. If the Respondent had made its objections in appeals to specific actions at the local level, then the title defect would be evident to the claimants and lessees. As it is, there is no way to tell that title might not be secure.

Moreover, because the suit involves the Washington records of an agency program, there is no way to tell what, if any, environmental values are really at stake. If the Respondent had chosen to challenge the individual agency actions that adversely impacted it, then proceedings could have addressed real environmental issues and given the claimants and lessees fair notice of a dispute. The sweeping programmatic challenge allowed by the Court of Appeals allows neither careful consideration of any environmental issues – which were addressed earlier with each specific agency action – nor fair notice of a dispute to claimants and lessees.

The decision of the Court of Appeals has created a fundamental injustice to the claimants and lessees. The precedent of that injustice will cause damage to everyone who relies on a government program. The decision of the Court of Appeals has significant potential for disruption of government programs and therefore must be reversed.

CONCLUSION

The Respondent in this case has sued to set aside the Withdrawal Review Program, a program that serves the general administrative purposes of the federal government. To allow lawsuits challenging, not specifically identifiable government actions, but government programs, will cause serious disruption of the federal government. That disruption will in turn cause serious harm to everyone who relies on government programs.

Because the rule set down by this Honorable Court preclude justiciablity of challenges to government programs and limit challenges to single agency actions, the Petition for Certiorari should be granted and the standing of the Respondent in this case should be denied.

Respectfully submitted,

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October, 1989.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, Plaintiff,	)	Civil Action No. 85-2238
v.	)	Filed
ROBERT F. BURFORD, *et al.*, Defendants.	)	Nov 04, 1988

MEMORANDUM OPINION

This case, which concerns the status of approximately 180 million acres of public land, was first filed on July 15, 1985, more than three years ago. A brief summary of the ensuing proceedings is appropriate.

On December 4, 1985, this Court granted plaintiff's motion for a preliminary injunction enjoining any new withdrawal revocations and classification terminations, as well as any activities inconsistent with previous withdrawals and terminations. *National Wildlife Federation v. Burford*, 676 F. Supp. 271 (D.D.C. 1985). At the same time we denied plaintiff's motion to dismiss. On February 10, 1986, pursuant to the defendants' motion to clarify, the previous injunction of December 4, 1985 was modified to make it clear that it reached only the federal defendants, not the activities of absent third parties, and was not intended "to overturn or in any way to upset fee interests."[1]

[1] The December 4, 1985 Order was subsequently amended on November 26, 1986, January 6, 1987, and April 11, 1988 to further limit its reach.

National Wildlife Federation v. Burford, 676 F. Supp. 280, 284 (D.D.C. 1986).

On December 11, 1987, the Court of Appeals for this Circuit in a lengthy split opinion (Judge Williams dissenting), affirmed this court's grant of preliminary relief. *National Wildlife Federation v. Burford*, 835 F.2d 305 (D.C. Cir. 1987) (*"Burford"*). It first addressed certain preliminary matters such as the challenge to plaintiff's standing, the effect on absent third parties, plaintiff's failure to exhaust its administrative remedies, and laches. *Burford*, 835 F.2d at 310-18. Passing to the merits, the Court held that the plaintiff had met the conventional criteria for the grant of preliminary relief and sustained the injunction. It conceded that it was a "close case" but held that this court did not abuse its discretion in holding that the plaintiff has shown a likelihood of success on the merits. *Id.* at 319, 327.

On April 29, 1988, in a brief slip opinion, the Appellate Court denied defendants' petition for a rehearing. *National Wildlife Federation v. Burford*, Nos. 86-5239, 86-5240, slip op. (D.C. Cir. April 29, 1988) (*per curiam*). It noted the seriousness of the case and its belief that "some of the criticisms of the breadth and scope of the preliminary injunction offered in the vigorous dissent are not without force." *Id.* at 1. Commenting on the far-reaching effect of this court's action in placing the status of vast tracts of land on "hold" and the confusion arising from this unsettled state of affairs, it expressed its belief "that the disposition of these million of acres should not continue to rest any longer than necessary on the foundation

of a preliminary injunction which was entered *on consideration of the brief affidavits and cursory materials presented to the court below.*" *Id.* (emphasis supplied). We were directed to proceed with this litigation "with dispatch." *Id.* This admonition was repeated by the Court of Appeals as recently as November 1, 1988, when it denied the defendants' emergency motion for a stay pending appeal. *National Wildlife Federation v. Burford*, No. 88-5291, slip op. (D.C. Cir. Nov. 1, 1988) (*per curiam*).

Present Posture

At issue is plaintiff's application for a permanent injunction. Pending before the Court are the motion of the defendants to dismiss and motions for summary judgment submitted by both parties. The matter has been extensively briefed.[2] Argument was held on July 22, 1988, at the conclusion of which the parties were directed to submit additional memoranda on the issue of plaintiff's

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[2] Defendants' motion for summary judgment filed September 12, 1986 is 86 pages in length and is accompanied by four declarations of Vincent J. Hecker, Chief, Division of Lands of the Bureau of Land Management (BLM), and the separate declarations of G. William Lamb, District Manager of BLM's Arizona Strip District, Ben Collins, District Manager of BLM's Las Vegas District Office, Ed Hastey, Director of BLM's California State Office, Jack Kelly, Manager of BLM's Lander, Wyoming Resource Area, and David C. Williams, Chief of BLM's Division of Planning and Environmental Coordination (BLM), as well as voluminous exhibits. Plaintiff's motion, as well as its responses to defendants' motion to dismiss and motion for summary judgment together with exhibits, are also extensive.

standing to bring this suit. Transcript of July 22, 1988 at 91-2. All parties have responded.[3]

Standing

In its opinion the Court of Appeals, after applying the "injury in fact" analysis required by Section 702 of the Administrative Procedure Act, concluded that based on the allegations of the complaint, "the Federation has alleged facts sufficient to establish injury in fact to its members." *Burford*, 835 F.2d at 312. In so doing, it pointed out that it has to assume that the allegations of the complaint were true and must be construed in the light most favorable to the organization. *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). More importantly, the issue of standing arose in the posture of defendant's motion to dismiss, which affected the degree of factual specificity required to be shown in order to establish the likelihood of personal injury to plaintiff's members. This distinction was emphasized in *SCRAP*,[4] where a suit alleging injury to members based on their use and enjoyment of natural resources was held by the Supreme Court sufficient to survive a motion to dismiss. At the same time, the highest Court acknowledged that, on a motion for summary judgment, the plaintiff might have to show

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[3] Plaintiff, in addition to its memorandum filed August 22, 1988 has submitted additional evidentiary material, including declarations from four of its members. These submissions are untimely and in violation of our Order. We decline to consider them. *See Federal Defendants' Reply to Plaintiff's Statement of Points and Authorities in Support of Its Standing to Proceed, at 1 n.1.*

[4] *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

injury with greater specificity. *See SCRAP*, 412 U.S. at 689 & n.15. Our Court of Appeals has more recently spelled out the importance of this distinction. *See Wilderness Society v. Griles*, 824 F.2d 4, 16-17 (D.C. Cir 1987) (Plaintiff's failure to show specificity of injury in response to defendant's motion for summary judgment precludes their standing, but case was reversed to permit plaintiff an opportunity for further discovery on this issue).[5] The Court's affirmance of standing in the instant case must therefore be read in the context of the procedural posture of the case when that Court considered this issue. The dissenting opinion, while observing that "[a]t this point in the proceeding the issue of standing is largely academic" and that "the defendants appear to have conceded the bare minimum necessary for standing," emphasized that the "specificity required for standing allegations to secure a preliminary injunction will normally be no less than that required on a motion for summary judgment." *Burford*, 835 F.2d at 327-28 (Williams, J., concurring and dissenting). This is because plaintiff's burden of showing likelihood of success of the merits presupposes a preliminary finding that plaintiff has standing. *See id.* at 328. In light of the foregoing, we turn now to reconsider our earlier finding that plaintiff has standing to pursue this litigation. Plaintiff predicates

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[5] The *Wilderness Society* litigation was terminated on October 31, 1988 through the entry of the "Stipulation of All Parties for Dismissal." The issues in that case were held to be mooted by the passage by Congress on August 16, 1988 of Pub. L. No. 300-395.

its claim of standing on two types of injury, informational or procedural injury to it as an organization and environmental harm to its members, both caused by defendants' administration of the Land Withdrawal Review Program.[6] Plaintiff's Memorandum in Support of Standing at 2.

Admittedly, the decisions on standing are not a model of consistency. However, it is generally agreed that, in order to satisfy the "case or controversy" requirement of the Constitution and Section 702 of the Administrative Procedure Act, the plaintiff must both plead and prove that it or its members have suffered some actual or threatened injury as the result of defendants' allegedly unlawful conduct. These requirements have been summarized by the Supreme Court in *Valley Forge Christian College v. Americans United for the Separation of Church and State*, 454 U.S. 464, 472 (1982), as follows:

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

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[6] This program concerns the termination of land classifications and the revocation of land withdrawals.

It is not disputed that an organization may have standing to bring suit on behalf of its members.[7] Plaintiff's claim of injury to it as an organization rests upon its alleged inability 1) to obtain information as to the federal defendants' Land Withdrawal Review Program and the actions completed under such program, and 2) to participate in the federal defendants' decision making. It claims that it, as an organization, is entitled "to see and use" the kind of information that would have been available had the federal defendants completed environmental impact statements. Plaintiff's Statement in Support of Standing at 2-3. In sole support of this position, plaintiff has submitted the declaration of Lynn Greenwall, its Vice President for Resources Conservation. An analysis of the Greenwall declaration shows, after a description of the plaintiff's organization and the nature and size of its membership, the plaintiff's educational program to inform its members concerning conservation issues and their financial support for this purpose, a bare claim that plaintiff's ability to meet the obligations to its members

> has been significantly impaired by the failure of the Bureau of Land Management and the Department of Interior to provide adequate information and public participation with respect to the Land Withdrawal Review Program.

Plaintiff's Statement in Support of Standing at 5.

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[7] To do so, it must meet the three-prong test for representational standing set forth by the Supreme Court. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). One of these requirements is that one or more of the organization's members has himself standing to sue.

It is apparent on its face that the Greenwall declaration is conclusory and completely devoid of specific facts. Plaintiff has the burden of proof on this issue and has failed to make a showing as to the existence of the elements essential to its case, *i.e.*, its lack of adequate information and opportunity for public participation. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). It has not done so. Its claim of informational and procedural injury to it as an organization is therefore without merit and provides no basis to support its claim of standing.[8]

Plaintiff's other claim of injury concerns alleged environmental harm to its members. Defendants do not challenge that fact that injury to the environment can support a claim of member standing, but rather they focus their attack on the particular showing of injury made in this case. Some useful guidelines have been set forth in *Wilderness Society*, 824 F.2d 4. Both *Wilderness Society* and the instant case concern vast tracts of land[9]

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[8] Although not required to do so, because defendants did not have the burden to disprove plaintiff's conclusory contention, defendants have advised plaintiff of the environmental documentation and the methodology employed and have made its extensive files containing such information available for the plaintiff's inspection. The fact that no individual environmental impact statements were done in individual classifications or withdrawal terminations adds nothing to plaintiff's claim of injury.

[9] *Wilderness Society* involved the selection by the State of Alaska of 100 million acres of federal land and Department of Interior's change of policy to exclude submerged lands from the total acreage to be conveyed to Alaska. *See Wilderness Society*, 824 F.2d at 7.

and do not involve allegations by a plaintiff that governmental action will be taken against it. Rather, they both concern conduct of a third party whose possible response will injury plaintiff. As was said in *Wilderness Society:*

> The standing question in these three-party cases frequently turns not on the issue of personal injury but rather on so-called causation issues, *i.e.*, whether the third-party's decision is sufficiently dependent upon governmental action that the plaintiff's injury is "fairly traceable" to the action and is "likely to be redressed" by an order binding the government. . . .[citing *Allen v. Wright*, 468 U.S. 737 (1984) and other cases] When personal injury is at issue in a three-party case, it usually depends upon how likely it is that the third-party's response to the challenged governmental action will injure the plaintiff *at all.*

824 F.2d at 11 (citations omitted).

The Court in *Wilderness Society* concluded its discussion of this problem with the following language which is particularly relevant to the facts of the instant litigation:

> To sum up, whether an allegation of threatened injury suffices for standing turns on the likelihood of the occurrences of that injury. . . . [T]he court must ascertain whether the third party's response to governmental action will . . . affect the plaintiff's intended behavior. Where the alleged injury involves access to land in a three party case, as in *Sierra Club, SCRAP,* and the case at bar, the judgment regarding the likelihood of injury turns on *whether the plaintiff's future conduct will occur in the same location as the third party's response to the challenged governmental action.* Otherwise, the threat of injury would be too amorphous or uncertain; it would be no

> greater for the plaintiff than for any person simply opposed to the governmental action in question. In short, the issue in each case is whether the plaintiff has put forward enough facts to show that his intended behavior will be injured as a direct or indirect result of the challenged governmental action.

Wilderness Society, 824 F.2d at 12 (emphasis supplied).

Plaintiff rests its entire claim of standing to sue for environmental injury on the affidavits of two persons, *i.e.*, Peggy Peterson and Richard Erman. Both of their brief affidavits were filed on May 22, 1986.[10] Neither appears to be referred to in plaintiff's Motion for Summary Judgment filed on June 23, 1986, which does not consider the question of plaintiff's standing.

The Peterson affidavit claims that she uses federal lands *in the vicinity* of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment and that her recreational aesthetic enjoyment has been and continues to be adversely affected as the result of the decision of BLM to open it to the staking of mining claims and oil and gas leasing. Peterson Affidavit, filed May 22, 1986. This decision[11] opened up to mining approximately 4500 acres within a two million acre area, the balance of which, with the exception of 2000 acres, has always been open to mineral leasing and

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[10] They are 3 and 3-1/2 page in length, respectively, and use the same boiler plate language and format.

[11] Termination of Classification No. W-6228 referred to in Federal Defendants' Motion for Summary Judgment, Statement of Facts at 6.

mining. *See* Kelly Affidavit attached to Federal Defendant's Motion for Summary Judgment filed September 4, 1986.[12] There is no showing that Peterson's recreational use and enjoyment extends to the particular 4500 acres covered by the decision to terminate classification to the remainder of the two million acres affected by the termination. All she claims is that she uses lands "in the vicinity." The affidavit on its face contains only a bare allegation of injury, and fails to show specific facts supporting the affiant's allegation.

The Erman Affidavit is similarly flawed. Erman asserts that he uses federal lands, including those in the vicinity of the Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest for recreational purposes and for aesthetic enjoyment. He further asserts that his recreational use and aesthetic enjoyment of federal lands, particularly those *in the vicinity* of the Grand Canyon National Park and the Arizona Strip have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department, with particular reference to the opening to the staking of mining claims and the failure of the Bureau and the Department to provide notice of their proposals to terminate classifications and other withdrawals and to provide opportunities for the public

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[12] The Kelly Affidavit sets forth in great detail the voluminous process started in 1977 and concluded in 1984 that the BLM office in Lander, Wyoming followed in reaching its decision to terminate Classification No. W-6228. It completely answers plaintiff's claims of inadequate land use plans, lack of conformance determination and insufficient opportunities for public participation.

involvement. Erman Affidavit filed May 22, 1986. The magnitude of Erman's claimed injury stretches the imagination. As the affidavit of J. William Lamb shows, the Arizona Strip consists of all lands in Arizona north and west of the Colorado River on approximately 5.5 million acres, an area one-eighth the size of the State of Arizona. Furthermore, virtually the entire Strip is and for many years has been open to uranium and other metalliferous mining. The revocation of withdrawal concerned only non-metalliferous mining in the western one-third of the Arizona Strip, an area possessing no potential for non-metalliferous mining. *See* Lamb Affidavit, attached to Federal Defendant's Motion for Judgment.[13]

Both the Peterson and Erman Affidavits are vague, conclusory and lack factual specificity. They do not and cannot show "injury in fact" with respect to the two specific areas in Wyoming and Arizona in the vicinity of which these affiants claim to be located. More important, standing alone, these two affidavits do not provide any basis for standing to challenge, as violative of the Federal Land Policy Management Act, the legality of each of the 1250 or so individual classification terminations and withdrawals revocations. It should be noted that plaintiff's claims of injury reach hundreds of decision affecting 180 million acres spread over seventeen states. Since plaintiff lacks standing in the constitutional sense or as

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[13] The Lamb Affidavit also details the history of the several withdrawals and classifications placed on the public lands comprising the Arizona Strip. These commenced in 1930 and were terminated in 1981 after the passage of the Federal Land Policy and Management Act, 43 U.S.C. § 1701, *et seq.*

an "aggrieved party" under Section 702 of the APA, we lack subject matter jurisdiction and dismiss for lack of standing.

Merits

In view of the position taken that this Court lacks jurisdiction for lack of standing, it is not necessary that we reach the merits of plaintiff's claim for injunctive relief. The dissenting opinion of the Court of Appeals has mirrored many of these problems in its discussion of our grant of preliminary injunction presented as it was in response to defendant's motion to dismiss.

An Order consistent with the foregoing has been entered this day.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

Date: 4 Nov. 88

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, Plaintiff,	)	Civil Action No. 85-2238
v.	)	Filed
ROBERT F. BURFORD, *et al.*, Defendants.	)	Nov 04, 1988

ORDER

Upon consideration of the parties' respective motions for summary judgment and oppositions thereto, the hearing thereon held July 22, 1988, and the parties' subsequent submissions on the issue of plaintiff's standing, it is by the Court this 4th day of November, 1988

ORDERED that this Court's grant of a preliminary injunction be vacated, and it is

ORDERED that Defendants' Motion for Summary Judgment be granted; and it is

FURTHER ORDERED that the above action shall stand dismissed for lack of standing.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 21, 1989 Decided June 20, 1989

No. 88-5397

NATIONAL WILDLIFE FEDERATION, APPELLANT

v.

ROBERT F. BURFORD, et al.

No. 88-5291

NATIONAL WILDLIFE FEDERATION

v.

ROBERT F. BURFORD, et al.

ASARCO INCORPORATED, APPLICANT
FOR INTERVENTION,
APPELLANT

Appeals from the United States District Court for the District of Columbia

(Civil Action No. 85-02238)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Eldon V.C. Greenberg, with whom *Kathleen C. Zimmerman* and *Norman L. Dean, Jr.* were on the brief, for appellant in No. 88-5397.

Jacques Gelin, Attorney, Department of Justice, with whom *Donald A. Carr*, Acting Assistant Attorney General, *Robert L. Klarquist and Fred R. Disheroon*, Attorneys, Department of Justice, were on the brief, for appellees in No. 88-5397.

Jerry L. Haggard, of the bar of Arizona, pro hac vice, by special leave of Court, with whom *Nancy C. Shea* and *H. Barry Holt* were on the brief, for appellants in No. 88-5291.

Kathleen C. Zimmerman, for appellee in No. 88-5291.

Eric Twelker also entered an appearance for appellees, in No. 88-5397.

Bruce J. Ennis, David W. Ogden and *David A. Handzo* were on the brief of amicus curiae The Wilderness Society urging reversal, in No. 88-5397.

Before: EDWARDS and RUTH B. GINSBERG, *Circuit Judges*, and KAUFMAN,* *Senior Judge*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge:* In July 1985, appellant National Wildlife Federation ("NWF" or "Federation"), a

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*Of the United States District Court for the District of Maryland, sitting by designation pursuant to 28 U.S.C. § 294(d).

nonprofit natural resources conservation and education association with over 4.5 million members, brought suit to challenge a Department of Interior ("Interior" or "Department") decision to reclassify the status of approximately 180 million acres of public land. The present appeals involve two decisions arising out of NWF's suit. First, on November 4, 1988 – after extended preliminary proceedings, including the issuance of a preliminary injunction enjoining Interior's challenged activity, which was upheld by this court in *National Wildlife Federation v. Burford, ("Burford I")*, 835 F.2d 305 (D.C. Cir. 1987), and various actions by the trial court amending the original injunction – the District Court granted Interior's motion for summary judgment on the ground that NWF lacked standing. NWF now appeals from that decision. Second, ASARCO, Inc. ("ASARCOA"), a producer of nonferrous metals, appeals the District Court's denial of its motion to intervene. The District Court so ruled because it found ASARCO's motion to be untimely filed.[1]

On the first appeal, No 88-5397, we adhere to the holding of the court in *Burford I* that NWF "has alleged injury in fact sufficient to establish standing to pursue its . . . claims against the Department," 835 F.2d at 314, and we conclude that the record before us is more than adequate to allow NWF to survive a motion for summary

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[1] These cases were argued separately before this court. NWF's appeal was docketed as case No. 88-5397, and ASARCO's as No. 88-5291. We have consolidated the two cases for decision because of the unity of the substantive issues underlying these procedural appeals.

judgment on standing. Therefore, we reverse the judgment of the District Court and remand for a determination on the merits.[2]

On the second appeal, No. 88-5291, we reverse the District Court's denial of ASARCO's motion to intervene with respect to one of ASARCO's claims, because we find that the motion was timely filed. We remand this portion of the case to the District Court to allow it to consider whether ASARCO's intervention is presently warranted.

I. BACKGROUND

A. *Standing of the National Wildlife Federation*

NWF filed suit under the Federal Land Policy and Management act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.* (1982); the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* (1982); and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.* (1982), challenging Interior's ongoing "Land Withdrawal Review Program" ("Program"). The Program primarily involves the termination of land "withdrawals" and "classifications," the two main vehicles through which Interior establishes and implements land use planning for millions of acres of federal public lands. "Classifications" allow Interior to categorize lands for specific usage, and frequently designate public lands for retention, thereby segregating them from the scope of various land disposal laws. "Withdrawals" directly remove designated public

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[2] We find it unnecessary to reinstate the preliminary injunction because the case should now proceed directly to the merits.

lands from disposal under the general land laws. The Program is implemented by the Bureau of Land Management ("BLM"), a subagency of Interior.

Pursuant to the Program, the Department, relying on its authority under the FLPMA,[3] lifted protective restrictions from nearly 180 million acres of federal land located in seventeen states. According to the Assistant Director of Land Resources for the BLM, over thirteen million acres of public lands that previously were closed to some or all types of mining are now open to be mined by private parties as a result of these classification and withdrawal terminations, *see* Affidavits of BLM Assistant Director Frank Edwards, Joint Appendix ("J.A.") 75, 102-03, and another eight million acres are now open for mineral leasing, *Burford I*, 835 F.2d at 324-25. Hundreds of leases and sales have already been effectuated or are pending for mining, mineral leasing, agricultural, commercial, and other proposed developmental uses. *See id.*

NWF filed suit challenging the Program on July 15, 1985, simultaneously moving for preliminary injunctive relief. On December 4, 1985, the District Court granted NWF's motion for a preliminary injunction, enjoining Interior from issuing any "withdrawal revocations" or "classification terminations" and from engaging in any

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[3] Until enactment of the FLPMA, terminations of classifications and withdrawals could be effected only by the President. However, in 1976, Congress enacted FLPMA § 202(d), 43 U.S.C. § 1712(d) (1982), which authorized the BLM to modify or terminate its previous classifications and withdrawals. The Program was thus enacted pursuant to the FLPMA and is subject to that statute's other substantive management criteria. *See, e.g., id.* §§ 1701, 1712, 1714.

activities inconsistent with extant withdrawals and terminations. *National Wildlife Federation v. Burford*, 676 F.Supp. 271 (D.D.C. 1985).[4]

On December 11, 1987, a panel of this court affirmed the District Court's grant of preliminary relief. *See Burford I supra*. This court first addressed preliminary matters such as standing, the effect on absent third parties, and exhaustion, *see* 835 F.2d at 310-18, and concluded "that the Federation has alleged facts that demonstrate that the actions of the Department threaten to harm the cognizable interests of the Federation's members. Consequently, we find that the Federation has alleged injury in fact sufficient to establish standing to pursue its two FLPMA claims against the Department." *Id.* at 314. Passing to the merits, the court in *Burford I* held that the Federation had satisfied the burden of proof necessary to sustain a preliminary injunction. Conceding that this was a "close" case, *id.* at 319, the court nevertheless held that the District Court has not abused its discretion in finding the NWF had shown a likelihood of success on the merits, *see id.* at 327.[5]

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[4] On February 10, 1986, pursuant to the defendants' motion to clarify, the District Court modified the injunction to make clear that it reached only the federal defendants and not absent third parties, and that it was not intended "to overturn or in any way to upset fee interests." *National Wildlife Federation v. Burford*, 676 F. Supp. 280, 284 (D.D.C. 1986). The original injunction was subsequently amended three more times prior to this appeal to further limit the reach of the injunction.

[5] Subsequently, in the course of denying another motion, a panel of this court exhorted the District Court to proceed with the litigation "with dispatch" because millions of acres of land

(Continued on following page)

Following this court's remand in *Burford I*, and during subsequent pre-trial proceedings before the District Court, NWF complained of the same specific injury from the Program's reclassifications that it had cited in its motion for the preliminary injunction. First, NWF claimed that its many members who "use and enjoy the environmental resources that will be adversely affected by the challenged actions" would be deprived of such use by the development of these lands. Brief for Appellant NWF at 10. Second, NWF complained that the organization and its members had been injured by being denied "information on the potential impacts of defendants' actions" as well as "the opportunity to participate in defendants' decision-making." *Id.* In support of these complaints, NWF resubmitted to the trial court the affidavits of two of its members, Peggy K. Peterson, *see* J.A. 209, and Richard L. Erman, *see* J.A. 205, and the sworn declaration of its Vice-President for Resources Conservation, Lynn A. Greenwalt, *see* J.A. 212. Two of these same affidavits had been ruled sufficient to establish standing for the purposes of a preliminary injunction by both the District Court itself and by this court in *Burford I*.

Both sides moved for summary judgment; the matter was extensively briefed and oral argument was heard on the motions on July 22, 1988. After oral argument the District Court directed both sides to submit additional

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(Continued from previous page)

were "on hold" due to a preliminary injunction issued only on the basis of brief affidavits and other cursory materials, *see National Wildlife Federation v. Burford*, 844 F.2d 889, 890 (D.C.Cir. 1988) (per curiam).

memoranda by August 22, 1988, on the issue of NWF's standing to bring suit. Both parties complied with this order, but the trial court then declined to consider certain of the additional material submitted by the Federation. The court stated that it found these submissions, which included "declarations from four of its members," to be "evidentiary material," submitted "in addition to [NWF's] memorandum filed August 22, 1988." Because it found these submissions to be "untimely and in violation of our Order," it "decline[d] to consider them." *National Wildlife Federation v. Burford*, No. 85-2238 (D.D.C. Nov. 4, 1988), *reprinted in* J.A. 367, 370 n.3 [hereinafter "Memorandum Opinion"].

In the same Memorandum Opinion, issued on November 4, 1988, the District Court also dismissed the case for lack of standing and lifted the preliminary injunction. The court acknowledged that NWF had established standing in the prior proceedings before the court of appeals because "the issue of standing arose in the posture of defendant's motion to dismiss." Memorandum Opinion, J.A. 370. On a motion to dismiss, the trial court reasoned, an appellate court had to assume the complaint's allegations to be true and had to construe them in a light most favorable to the organization. *See id.* (citing *Burford I*, 835 F.2d at 312; *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). The District Court opined that Supreme Court and subsequent D.C. Circuit precedent mandated that more specific injury-in-fact must be shown to sustain standing on a motion for summary judgment than to sustain standing on a motion to dismiss. *See* Memorandum Opinion, J.A. 370-71 (citing *United States v. Students Challenging Regulatory Agency Procedures ("SCRAP")*, 412

U.S. 669, 689 & n.15 (1973); *Wilderness Society v. Griles*, 824 F.2d 4, 16-17 (D.C. Cir. 1987). The trial court, however, failed to give due weight to the fact that the panel in *Burford I* held that NWF had established standing for purposes of a preliminary injunction, and not merely to survive a motion to dismiss.

Reconsidering its initial finding of standing in light of what it saw as this more demanding *SCRAP/Griles* standard, the trial court concluded that the affidavits submitted by NWF were insufficient evidence of injury-in-fact to sustain standing. The court rejected the affidavit of NWF Vice-President Greenwalt as "conclusory and completely devoid of specific facts." Memorandum Opinion, J.A. 374. Turning to the Peterson and Erman affidavits, the court noted that these presented the issue of so-called "third-party injury – that is, injury to the plaintiff that is caused by the future conduct of a third party (in this case, a mining company), in response to defendant's action, rather than by the direct action of the defendant. The court therefore defined the standing issue as "whether the plaintiff has put forward enough facts to show that his intended behavior will be injured as a direct or indirect result of the challenged governmental action." *Id.*, J.A. 375 (quoting *Griles*, 824 F.2d at 12). The trial court concluded that the Peterson and Erman affidavits were "vague, conclusory and lack[ed] [the] factual specificity. . . . [to] show 'injury in fact.'" *Id.*, J.A. 378. Specifically, the court found that, because Peterson claimed only that she uses lands "in the vicinity" of the South Pass-Green Mountain area of Wyoming for recreation, the affidavit was not specific enough to show that her use and enjoyment extended to the *particular* 4500

acres that would be affected by the challenged Department termination within the described two million acre area. The court found the Erman affidavit to be "similarly flawed" with respect to the Arizona lands it addressed. *See id.*, J.A. 377. This appeal followed.

B. *ASARCO's Motion to Intervene*

Under one classification that the Program terminated, 31,000 acres of federal land in central Oregon were withdrawn from private appropriation, including the location of mining claims. Pursuant to this classification termination, the BLM permitted ASARCO, whose business includes the exploration and development of mineral interests through mining claims on federal lands throughout the western United States, to stake mining claims on some of these lands from November 1987 through January 1988. These claims are known as the "Spanish Gulch" claims. However, because of the order of the District Court enjoining the post-1981 terminations, the BLM subsequently notified ASARCO by letter dated March 21, 1988, that its Spanish Gulch claims were null and void. The letter explained that as of February 10, 1986, and continuing until the injunction was lifted or modified, the BLM could not open the Spanish Gulch lands to private mining claims. *See* ASARCO Appendix ("A.A") 30-31.

On June 6, 1988, ASARCO moved to intervene as a defendant in the NWF action.[6] ASARCO maintained that the scope of NWF's complaint and the application of the

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[6] ASARCO also appealed the BLM's determination to the Interior Board of Land Appeals.

preliminary injunction did not extend to some interests in federal land, including ASARCO's Spanish Gulch claims.[7] Although ASARCO's motion to intervene was filed three years after the filing of NWF's original suit, and two-and-a-half years after the issuance of the District Court's preliminary injunction, it was filed less than three months after ASARCO was notified by Interior that its Spanish Gulch claims were directly affected by this litigation.

On July 22, 1988, the same day the District Court heard oral argument on the cross-motions for summary judgment in the outgoing NWF suit against the Government, the trial court also denied ASARCO's motion to intervene "into this longstanding litigation," stating that the motion was untimely under Rule 24 of the Federal Ruled of Civil Procedure.[8] *See National Wildlife Federation v. Burford*, No. 85-2238 (D.D.C. July 22, 1988), *reprinted in*

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[7] ASARCO based this argument on the fact that some land classifications, including the Spanish Gulch claims, had already terminated by operation of law well before 1981, under the now-expired Classification and Multiple Use Act of 1964, so that the preliminary injunction could not encompass these terminations.

[8] ASARCO sought a stay of the District Court's order pending its appeal. By order dated September 6, 1988, the District Court denied the stay, finding that ASARCO's then asserted interests were already adequately represented by existing parties to the litigation, that the motion to intervene was untimely, and that further postponement of the case "would be harmful to the parties and the public." *National Wildlife Federation v. Burford*, No. 85-2238, slip op. at 2 (D.D.C. Sept. 6, 1988).

A.A. 39. As noted above, the District Court subsequently dismissed the Federation's case for lack of standing and simultaneously dissolved the preliminary injunction from which ASARCO claimed injury. ASARCO appealed, subject to this court's disposition of NWF's appeal in the primary case.

II. ANALYSIS

A. *Standing of the National Wildlife Federation*

It is well settled that an organization may have standing to bring suit on behalf of its members. *See International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock ("UAW v. Brock")*, 477 U.S. 274, 281-90 (1986); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). In *Hunt*, the Supreme Court determined that an organization seeking to pursue members' claims in a representational capacity may do so if

> (a) [one or more of the organization's] members would otherwise have standing to sue in their own right; (b) the interests [the organization] seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. at 343. *See also Burford I*, 835 F.2d at 311. At issue in the instant case is only the first of the *Hunt* factors; no one disputes that the last two requirements have been

met.[9] Thus, the crux of the standing issue on this case is whether Federation members would have standing to sue in their own right.

Article III of the Constitution limits the rights of individuals to seek judicial redress by extending the "judicial power" of the United States only to the resolution of "cases" and "controversies". U.S. CONST. art. III, § 2. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982), the Supreme Court described the scope of these limitations as follows:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 411 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

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[9] To wit, first, NWF seeks to protect its members' interests in preserving the environmental resources that will be adversely affected by the Interior action. These interests are germane to NWF's purposes, which include natural resource preservation and conservation. Second, there is no reason to require individual Federation members to participate in this case. Courts have generally required individual participation only when there are conflicts of interest within an organization, *see, e.g., Harris v. McRae*, 448 U.S. 297, 320-21 (1980), or when individual participation in a suit is needed in order to make damage determinations, *see, e.g., Warth*, 422 U.S. at 515-16.

Of these three constitutional standing components – injury-in-fact, causation, and redressibility – the District Court in the case before us rested its denial of standing only on the first. It found that NWF had not demonstrated the requisite injury-in-fact, because NWF's affidavits did not evidence a particular showing of injury. We disagree and reverse this finding.[10]

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[10] Defendant-intervenor Mountain States Legal Foundation ("Mountain States") raises several other challenges to NWF's standing in addition to the injury-in-fact challenge. These involve the causation and redressibility requirements for constitutional standing, and the prudential "generalized grievance" limitation on standing – *i.e.*, that the injury must not be a generalized grievance about the conduct of government, since these are most appropriately addressed in the representative branches. *Warth*, 422 U.S. at 499-500; *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d at 1322, 1335 (D.C. Cir. 1986). We reject these other standing claims.

To begin with, there is no doubt that any injury alleged by NWF is caused by, and could be easily redressed by, the Department's modification of its plans under the Program. Mountain States argues that the injury to NWF members will not be caused directly by the Government but, rather, by mining and other development companies affected by regulations under the Program. Therefore, according to Mountain States, because NWF has not alleged facts sufficient to identify any adverse action that will be taken by these companies, plaintiff's injury is not "fairly traceable" to that action, nor is it "likely to be redressed" by an order binding the Government. It is understandable why neither the District Court in its decision below nor the Government on this appeal endorses Mountain States' position, for it is patently flawed.

Once the lands in dispute are removed from Government regulation or protection under the Program and made available

(Continued on following page)

1. *Injury-in-Fact*

NWF claims it is entitled to judicial review under section 10(a) of the APA, 5 U.S.C. § 702 (1982).[11] Injury-in-

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for private mining and other developmental uses, NWF will have no claim against those in control of the land development projects. Furthermore, to the extent that evidence regarding private developmental uses is relevant, it has already been addressed by this court in *Burford I*. Based on both the challenged NWF affidavits and the sworn statements of Government officials delineating the precise scope of pending third-party activity in response to the Program, this court specifically rejected the argument now advanced by Mountain States. *See Burford I*, 835 F.2d at 313-14, 324-25. The relevant portion of that opinion has not been called into question or resisted in any way by any litigant. The intervenor has offered no valid basis for reconsideration of our earlier rejection of this argument, and the Government has not even seen fit to raise the issue. Intervenor's position obviously lacks any merit, and we accordingly reject it.

Nor do we find any merit in the intervenor's claim that the Federation should be denied standing under the prudential "generalized grievance" principle. It is plain in this case that NWF has not based its claim on any generalized grievance about the Government's activities, but rather on the concrete injury to its members. The Supreme Court has "made it clear that standing is not to be denied simply because many people suffer the same injury." *SCRAP*, 412 U.S. at 687. As long as there is a "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast v. Cohen*, 392 U.S. 83, 102 (1968), plaintiffs will have met the "generalized grievance" criteria. We find that, on the facts of this case, NWF has alleged such a "logical nexus."

[11] Section 702 gives the right of judicial review to a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."

fact analysis under the APA mirrors that required by the Constitution. *See Community for Creative Non Violence v. Pierce*, 814 F.2d 663, 667 (D.C. Cir. 1987). This injury-in-fact requirement is satisfied by the presence of a "distinct and palpable injury." *Warth*, 422 U.S. at 501; *see also Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1331 (D.C. Cir. 1986). The injury may result from invasion of a statutory right as well as a constitutional one, *see, e.g., Schelsinger v. Reservists Comm. to Stop The War*, 418 U.S. 208, 224 n.14 (1974); *Sierra Club v. Morton*, 405 U.S.727, 732 & n.3 (1972), but it must be more than merely "abstract" or "conjectural" to suffice, *Allen v. Wright*, 468 U.S. 737, 751 (1984). The injury need not be important or large; an "identifiable trifle" can meet the constitutional minimum. *SCRAP*, 412 U.S at 689 n.14. "And an injury shared by a large number of people is nonetheless an injury." *Center for Auto Safety*, 793 F.2d at 1331 (citing *Sierra Club*, 405 U.S. at 734).

Elaborating on the injury-in-fact standard, the *Burford I* court explained that "[t]he Federation must allege facts demonstrating a definable and discernible injury to its members and an adequate connection between that injury and the members. *See [SCRAP*, 412 U.S. at 688-89]. The personal injury may be 'actual or threatened.' [*Valley Forge*, 454 U.S. at 472]." 835 F.2d at 311. The *Burford I* court then analyzed "a pair of environmental lawsuits relevant to this case," *id.*, handed down by the Supreme Court that elaborate on the requirement in this context. In *Sierra Club*, the Court denied standing to the Sierra Club

on its allegation that the Government's decision to permit development of a quasi-wilderness national park would "destroy or . . . adversely affect" the natural resources in the park and would "impair . . . enjoyment . . . for future generations." 405 U.S. at 734. Although acknowledging that this was a cognizable injury, the Court nonetheless found that it did not amount to injury-in-fact sufficient to uphold standing because the Sierra Club had "failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development." *Id.* at 735. In contrast, the Court found in *SCRAP* that the plaintiff-organization had established standing to challenge an ICC rate increase. No doubt tailoring its complaint to conform with the decision in *Sierra Club*, the *SCRAP* plaintiffs had alleged that their members used "the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area" for various recreational and aesthetic purpose, and that these uses would be disturbed by a chain of third-party responses to the challenged agency action. *SCRAP*, 412 U.S. at 678. The *Burford I* court summarized the teachings of these cases as making "clear that in order to establish injury in fact for representational standing, an organization must allege facts showing that one or more of its members is among the persons injured by the challenged agency action." 835 F.2d at 311.

The affidavits submitted by the Federation in this case clearly alleged facts showing that its members were "among the persons injured" by Interior. Thus, we hold that in this case as pleaded on July 22, 1988, *i.e.*, at the time of the District Court's hearing on the cross-motions for summary judgment, NWF demonstrated sufficient

detail of injury-in-fact to survive a motion for summary judgment on standing grounds. In other words, even leaving aside the applicable law of the case established by this court in *Burford I*, *see* part II.A.2 *infra*, and the supplemental affidavits submitted by petitioners after the hearing on the motions for summary judgment, *see* Part II.A.3 *infra*, there was enough detail in support of standing to raise material issues of fact sufficient to require the trial judge to consider the case on the merits. In fact, the original Peterson affidavit alone raised "genuine issue[s] [of] material fact," FED. R. CIV. P. 56(c), with respect to the standing issue, enabling petitioners to survive a motion for summary judgment.[12]

Peterson's affidavit stated:

> My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and

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[12] As a preliminary matter, we note the District Court's finding that

> standing alone, the [Peterson and Erman] affidavits do not provide any basis for standing to challenge, as violative of the Federal Land Policy Management Act, the legality of *each* of the 1250 or so individual classification terminations and withdrawal revocations.

J.A. 378 (emphasis added). As we stated in *Burford I*, *see* 835 F.2d at 324, to the extent that this summarizes the trial court's reasoning, it reflects an erroneous application of law. The applicable law governing standing requires that plaintiffs be injured by only *one* of the terminations. *See UAW v. Brock*, 477 U.S. at 282-86; *Warth*, 422 U.S. at 511.

> the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened up to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

J.A. 210. The District Court found this statement not to be specific enough because the Interior

> decision [to open the South Pass-Green Mountain area of Wyoming to mining claims and oil and gas leasing] opened up to mining approximately 4500 acres within a two million acre area, the balance of which, with the exception of 2000 acres, has always been open to mineral leasing and mining. . . . There is no showing that Peterson's recreational use and enjoyment extends to the particular 4500 acres covered by the decision to terminate classification.

Memorandum Opinion, J.A. 376-77.

On the record of this case, the trial court's reasoning does not support the result reached. Interior planned to open to leasing all but 2000 of the remaining unleashed 6500 acres in a two million acre area. The language of Peterson's affidavit can be read to *presume* that the 4500 newly opened acres included the areas that Peterson uses; otherwise, *her use* and enjoyment would not be "adversely affected" in any way. In other words, the universe of the land to which Peterson's affidavit refers can only encompass the 6500 acres that was not yet opened to mining and leasing claims. Of these 6500 acres, only 4500 are affected by the Program. If Peterson was not referring to lands in this 4500-acre affected area, her allegation of impairment to her use and enjoyment would be meaningless, or perjurious. The District Court in no way questions

the *veracity* or *clarity* of the affidavit, only its *specificity*. Cf. SCRAP, 412 U.S. at 689 (court will not consider whether allegations in affidavits are untrue unless alleged by opposing party). But the trial court overlooks the fact that unless Peterson's language is read to refer to the lands affected by the Program, the affidavit is, at best, a meaningless document.

At a minimum, Peterson's affidavit is ambiguous regarding whether the adversely affected land are the ones she uses. When presented with ambiguity on a motion for summary judgment, a District Court must resolve any factual issues of controversy in favor of the non-moving party, even when the issue of harm and the issue on the merits are intertwined. *See Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 94 (D.C. Cir. 1986); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 810 (D.C. Cir. 1983); *accord National Wildlife Federation v. Snow*, 561 F.2d 227, 236-37 (D.C. Cir. 1976). This means that the District Court was obliged to resolve any factual ambiguity in favor of NWF, and would have had to assume, for the purposes of summary judgment, that Peterson used the 4500 affected acres. Accordingly, we find that Peterson has alleged injury-in-fact sufficient to give her standing to sue, and therefore that NWF also has standing under the *Hunt* criteria.[13]

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[13] Because we find the Peterson affidavit to be adequate support for the standing claim, it is unnecessary for us to decide whether the Erman and Greenwalt affidavits, both of which differ somewhat from Peterson's, are specific enough to merit standing. *See Sierra Club*, 405 U.S. at 740 n.15, ("The test

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2. *The Law of the Case*

Furthermore, and equally importantly, our decision on this appeal is precisely in accord with what another panel of this court found the first time this case was heard on appeal in *Burford I*. The *Burford I* court held that "the affidavits supplied by the Federation specifically identify locations where its members' interests are threatened by the Department's actions in lifting restrictions on mining and other forms of natural resource exploitation." 835 F.2d at 325. The affidavits referred to by the court are the *very same* ones that we now review; the *Burford I* court expressly held they provided adequate grounds for NWF to establish irreparable harm at the preliminary injunction stage. Even Judge Williams, concurring in part and dissenting in part from *Burford I*, agreed that the record established NWF's standing, albeit "minimally." 835 F.2d at 329-30. For another panel of this court subsequently to contradict this express finding when circumstances have

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of injury in fact goes only to the question of standing to obtain judicial review"; once standing is established, "the party may assert the interests of the general public in support of his claims for equitable relief."): *Sierra Club v. Adams*, 578 F.2d 389, 391 (D.C. Cir. 1978).

We only note here that the *Burford I* court found that the Federation had demonstrated injury-in-fact based on both the Erman and Peterson affidavits. *Burford I*, 835 F.2d at 314; *see also id.* at 329-39 (Williams, J., concurring and dissenting in part) (noting that intervenor Mountain States conceded in oral argument that "some of the acreage opened to mining was in the vicinity of lands used by [Erman] in Arizona"). *See also* Part II.A.2 *infra*.

not changed would contravene the law of the case. *See* 1B MOORE'S FEDERAL PRACTICE ¶0.404[1] at 119 ("[w]hen a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand") (emphasis in original); *Doe v. New York City Dep't of Social Serv.*, 709 F.2d 782, 788-89 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983).

We recognize that *Burford I* analyzed the showing necessary to survive a challenge to standing on a motion to dismiss, which was the posture of this case when it was first appealed. The Government now argues that, because the majority opinion in *Burford I* discussed standing in connection with a motion to dismiss, 835 F.2d at 312, the court never confronted the *Griles test*, which sets a somewhat higher standard for obtaining standing on a motion for summary judgment than on a motion to dismiss. *See Griles*, 824 F.2d at 16 ("[W]hile a motion to dismiss may be decided on the pleadings alone, construed liberally in favor of the plaintiff, a motion for summary judgment by definition entails an opportunity for a supplementation of the record, and accordingly a greater showing is demanded of the plaintiff."). However, what is critical for purposes of review here is that the court in *Burford I* also found standing to support the District Court's grant of a preliminary injunction in favor of petitioners.

The Government's argument completely fails to recognize that, in this case, the burden of establishing irreparable harm to support a request for a *preliminary injunction* is, if anything, at *least as great* as the burden of resisting a *summary judgment motion* on the ground that the plaintiff cannot demonstrate "injury-in-fact." To

obtain a preliminary injunction, NWF not only had to demonstrate specific harm, but also carry the *burden of persuasion*, showing a likelihood of success on the merits. On a motion for summary judgment, a plaintiff need only create a jury issue.

When the *Burford I* court found standing to support a preliminary injunction, it also found sufficient injury-in-fact to support the test of standing under *Griles*. As Judge Williams' separate opinion states, *"the specificity required for standing allegations to secure a preliminary injunction will normally be no less than that required on a motion for summary judgment."* 835 F.2d at 328 (emphasis added). To the extent that *Griles* requires a higher degree of specificity to show injury-in-fact for standing at the summary judgment stage than would be required on a motion to dismiss, the court in *Burford I* found this burden to be met in upholding petitioners' standing to secure a preliminary injunction. The *Burford I* decision upholding petitioners' standing is therefore the law of the case, which disposes of this appeal.

3. *The Supplemental Affidavits*

Because *Burford I* expressly found that petitioners had satisfied the standing requirements, there was not reason for petitioners to suspect that there remained any standing question on remand. If the District Court felt that the standing question was still open, or that more information was required to assess the issue, then it could have permitted petitioners to supplement the record. *See Griles*, 824 F.2d at 17 n.10 ("a district court can assure that appropriate extra-pleading materials are consulted in

determining the threshold jurisdictional issue"). The law of this circuit allows plaintiffs to supplement the record to cure alleged defects on standing. *See, e.g., National Wildlife Federation v. Hodel,* 839 F.2d 694, 703 (D.C. Cir. 1988). The equities of this case unquestionably compel such an allowance: the papers on which the trial court relied were two years old by the time it requested supplemental memoranda on the standing issue, and there was no indication prior to the trial court's request that NWF should have doubted the adequacy of the affidavits it had already submitted. Moreover, appellees had full opportunity to refute the evidence in these affidavits; the District Court had specifically given appellees ten days to file "any opposition" to NWF's supplemental memorandum. J.A. 345. In this context, we find that it was unfair and an abuse of discretion for the trial court to refuse to consider the affidavits submitted by NWF when the court asked for supplemental memoranda on the standing issue.

No party to this litigation seriously disputes that NWF's supplemental affidavits, if considered, easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests. Thus, even if the original affidavits were insufficient, and even if we assume that this court's decision in *Burford I* did not decide the issue, these supplemental affidavits offer enough detail to establish NWF's standing.[14]

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[14] In light of our decision that the Federation has standing to sue in its own right, it is unnecessary to consider whether plaintiff-intervenor Congressman Bruce Vento also has standing, or whether his standing claims are interdependent with those of the Federation in any way. Congressman Vento has separately appealed the dismissal of his case.

B. *ASARCO's Motion to Intervene*

The District Court found ASARCO's intervention claim to be untimely under Rule 24(a) of the Federal Rules of Civil Procedure, which provides that a party may intervene as a matter of right if, *inter alia*, the motion to intervene is timely filed.[15] We disagree with the trial court's finding only with respect to the Spanish Gulch claims, for ASARCO acted promptly to intervene in the suit as soon as the BLM construed the District Court's preliminary injunction order to invalidate these claims. However, we agree with the District Court on ASARCO's other, more general claims.

The timeliness of a motion to intervene does not depend solely on "the amount of time which has elapsed since the litigation began [but . . . also [on] . . . the related circumstances, including the purpose for which intervention is sought . . . and the improbability of prejudice to those already parties in the case." *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 129 (D.C. Cir 1972); *see also* NAACP *v. New York*, 413 U.S. 345, 366 (1973) (whether a motion to intervene is timely "is to be determined from all the circumstances"); *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 907 (D.C. Cir. 1977).

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[15] FED. R. Civ. P. 24(a) (2) also requires that the applicant must claim an interest relating to the property that is the subject of the action; must show that the judicial disposition of the action may impair or impede the applicant's ability to protect its interest; and must show that the applicant's interests are not adequately represented by existing parties.

In this case, the salient factor is not when ASARCO's motion to intervene was filed with respect to the filing of NWF's original suit, or even with respect to the District Court's issuance of the preliminary injunction. Rather, the relevant time from which to assess ASARCO's right of intervention is when ASARCO knew or should have known that any of its rights would be directly affected by this litigation. The record indicates without refutation that ASARCO filed its motion to intervene on June 6, 1988, only 73 days after it received the March 21, 1988, letter from Interior through which ASARCO actually discovered that its Spanish Gulch claims were suspended by the preliminary injunction. Thus, the only remaining question is whether ASARCO can be ascribed with constructive notice before this event. Nothing in the record before us indicates that this question could be answered in the affirmative.

The only possible event that might be construed to have put ASARCO on notice that its interests were at stake in this case would be the February 10, 1986, publication of the preliminary injunction order in the *Federal Register*. However, as the opinion of the District Court notes, the publication in the *Federal Register* was not specific enough vis-a-vis the exact lands affected to "alert even the most careful reader that defendant's classification terminations should inspire protest." *National Wildlife Federation v. Burford*, 676 F.Supp. at 282. Thus, there was no way that this publication could have given ASARCO notice that its Spanish Gulch claims were in jeopardy.

It is clear, then, that ASARCO could not have been required to intervene to protect its Spanish Gulch claims

before it received the letter from the BLM notifying it that these claims would be disrupted. Accordingly, we reverse the District Court's finding that ASARCO's intervention with respect to these claims was untimely. We do agree with the District Court, however, that any other generalized claims (besides the particularized Spanish Gulch claims) that ASARCO wished to raise in this litigation should have been brought in a timely fashion after the *Federal Register* publication of these proceedings; this publication provided sufficient notice of the agency action to arouse any *general* challenges ASARCO may have had. We therefore hold that ASARCO is entitled to bring only its Spanish Gulch claims in District Court because only these claims were timely filed.

We emphasize that we find only that ASARCO's Spanish Gulch claims were timely filed. Because the District Court has not yet considered ASARCO's motion for intervention on the merits, we do not require intervention; instead, we leave the scope of relief to be determined by the District Court. We also note that since we have not reinstated the preliminary injunction that initially produced ASARCO's alleged injury, administrative remedies may now become available to ASARCO that will render intervention altogether unnecessary. Therefore, we remand to the District Court for consideration of ASARCO's motion to intervene under the remaining requirements of Rule 24(a) of the Federal Rules of Civil Procedure.

III. CONCLUSION

We reverse and remand the District Court's summary judgment against NWF on grounds of standing, because we find that the Federation has shown judgment on this

issue. Moreover, to find otherwise would contravene the law of the case. The District Court must now address NWF's claims on the merits and fashion whatever relief it deems appropriate. We further find that the District Court's refusal to consider NWF's supplemental affidavits was an abuse of discretion, and direct the court to take into consideration any appropriate further submissions from the parties necessary to a proper resolution. We decline, however, to reinstate the preliminary injunction because the case should now proceed with dispatch.

We also reverse the trial court's finding that ASARCO's motion to intervene with respect to its Spanish Gulch claims was untimely filed. We remand this issue to the District Court for consideration of the question whether ASARCO is an appropriate intervenor of right given our disposition of the other issues in this case.

So ordered.